United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

760

No. 2201.

ISAAC S. LYON, APPELLANT,

vs.

ISAAC B. BURSEY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED AUGUST 6, 1910.

IN THE

Court of Appeals, District of Columbia

No. 2201.

ISAAC S. LYON, *Appellant,*
vs.
ISAAC B. BURSEY, *Appellee.*

BRIEF OF APPELLEE.

Split causes:

Bartels vs. Redfield, 16 Fed. Rep., 336, 343, citing.
Baird vs. U. S., 96 U. S., 430

Former Recovery:

Sedgwick and Wait on Trial of Title to Land, Secs. 506 to 539, particularly 524, 539.

The defense is admissible under the general issue.

Ridgeway vs. Ghequier, 1 Ca. C. C., 87.
Welch vs. Lindo, 1 Ca. C. C., 508.
Stone vs. Stone, 2 Ca. C. C., 118.
Shafer vs. Stonebraker, 4 G. and J., 345, 360.
Beall vs. Pearre, 12 Md., 550, 566.

The original cause of action passed in *rem judicatum.*

Biddle vs. Wilkins, 1 Pet., 686, 692.
Gaines vs. Miller, 111 U. S., 395.

General principles:

Deed to plaintiff after suit would not have supported action.

Hollingsworth vs. Flint, 101 U. S., 596.
McCool vs. Smith, 1 Black., 470.

Respectfully submitted,
WM. HENRY WHITE,
Attorney for Appellee.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1910.

No. 2201.

ISAAC S. LYON, APPELLANT,

vs.

ISAAC B. BURSEY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 15, 1910.

In the Court of Appeals of the District of Columbia.

No. 2201.

ISAAC S. LYON, Appellant,
vs.
ISAAC B. BURSEY.

---

a Supreme Court of the District of Columbia.

At Law. No. 49305.

ISAAC S. LYON, Plaintiff,
vs.
ISAAC B. BURSEY, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:—

1 *Declaration.*

Filed March 25, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49305.

ISAAC S. LYON
vs.
ISAAC B. BURSEY.

1. The plaintiff Isaac S. Lyon sues the defendant Isaac B. Bursey to recover possession of an undivided one half of all that piece or parcel of land and premises situate on Fifth street Northeast, in the City of Washington, District of Columbia and known and distinguished as the North One half of original Lot numbered Seven (7) in square numbered Eight Hundred and thirty-four (834) in said city and District, in which the plaintiff claims an estate in fee

simple, and of which he was lawfully seized and possessed on to wit, the 1st day of October 1905, when the defendant wrongfully entered the same, and wrongfully ejected the plaintiff therefrom, and thenceforward has wrongfully detained the same, and still wrongfully detains the same from the plaintiff, and is wrongfully exercising acts of ownership thereon, and the plaintiff is entitled to possession of said undivided one half interest. And the plaintiff claims possession of said undivided one half part of said described land and premises with the improvements and appurtenances besides costs of suit.

2. And plaintiff sues the defendant for rent, use and occupation, and for mesne profits of said undivided one half part of said
2 North half of original Lot numbered Seven (7) in square numbered Eight Hundred and thirty four (834) situate on Fifth street Northeast in the City of Washington, District of Columbia from to wit, the 1st day of October, 1905. And plaintiff claims $300.00 besides costs of suit.

ISAAC S. LYON, *Plaintiff.*

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day exclusive of Sundays and legal holidays, occurring after the day of the service hereof otherwise judgment.

ISAAC S. LYON, *Plaintiff.*

Plea.

Filed April 16, 1907.

The defendant for plea to the declaration, and each of the counts thereof, says he is not guilty in the manner and form as therein alleged.

WM. HENRY WHITE,
Attorney for Defendant.
J. R. C.

Service of a copy of the above plea acknowledged this 16th day of April, A. D. 1907.

ISAAC S. LYON, *Plaintiff.*

3 *Joinder in Issue.*

Filed April 17, 1907.

The plaintiff joins issue upon the defendant's plea.

ISAAC S. LYON, *Plaintiff.*

Notice of Trial.

Take notice that the issue joined in this cause will be tried at the next October term of this Court.

ISAAC S. LYON, *Plaintiff.*

Memorandum.

May 26, 1908.—Verdict for Plaintiff for possession of property in controversy and $129 damages.

4 Supreme Court of the District of Columbia.

FRIDAY, *June* 5, 1908.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

Upon hearing the defendant's motion for a new trial, it is considered that the same be, and hereby is overruled, and judgment on verdict ordered.

Therefore it is considered that the plaintiff recover against said defendant possession of all that piece or parcel of land situate in the City of Washington, District of Columbia, known and described as an undivided one half of all that piece or parcel of land and premises situate on Fifth Street, Northeast, in the City of Washington, District of Columbia known and distinguished as the North one half of original Lot numbered Seven (7) in Square Numbered Eight Hundred and thirty four (834) in the said City and District, and One hundred and twenty nine dollars ($129) for rent, use and occupation and meuse profits as aforesaid assessed, together with his costs of suit, to be taxed by the Clerk, and have execution thereof.

The defendant notes an appeal to the Court of Appeals of the District of Columbia, and upon motion, the penalty of the bond on said appeal to act as a Supersedeas is hereby fixed in the sum of Five hundred dollars ($500) or, in lieu thereof a cost bond in the sum of One hundred dollars ($100).

5 *Memoranda.*

June 18, 1908.—Appeal bond filed.
July 14, 1908.—Bill of Exceptions made part of record.

Mandate.

Filed January 13, 1909.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the District of Columbia, Greeting:

Whereas, lately in the Supreme Court of the District of Columbia, before you, or some of you, in a cause between Isaac S. Lyon, plaintiff, and Isaac B. Bursey, defendant, Law No. 49305, wherein the

judgment of the said Supreme Court entered in said cause on the 5th day of June, A. D. 1908, is in the following words, viz:

"Upon hearing the defendant's motion for a new trial, it is considered that the same be, and hereby is overruled, and judgment on verdict ordered.

Therefore, it is considered that the plaintiff recover against said defendant possession of all that piece or parcel of land situate in the City of Washington, District of Columbia, known and described as an

6 undivided one half of all that piece or parcel of land and premises situate on Fifth Street, Northeast, in the City of Washington, District of Columbia known and distinguished as the North one half of original lot numbered Seven (7) in Square Numbered Eight Hundred and thirty four (834) in the said City and District, and One Hundred and twenty nine dollars ($129) for rent, use and occupation and mesne profits as aforesaid, assessed together with his costs of suit, to be taxed by the Clerk, and have execution thereof.

The defendant notes an appeal to the Court of Appeals of the District of Columbia, and upon motion the penalty of the bond on said appeal to act as a Supersedeas is hereby fixed in the sum of Five hundred dollars ($500), or in lieu thereof a cost bond in the sum of One hundred dollars ($100)."

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the Act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and eight, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that the

7 said defendant, Isaac B. Bursey, recover against the said plaintiff Forty three dollars and eighty cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the views expressed in the opinion of this Court.

DECEMBER 22, 1908.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Seth Shepard, Chief Justice of said Court of Appeals, the 12th day of January in the year of our Lord one thousand nine hundred and eight.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Costs of defendant—	
Clerk	$7.30
Attorney	$5.00
Printing Record	$31.50
	$43.80
Record	$11.32
	$55.12

8 Supreme Court of the District of Columbia.

THURSDAY, *February 4th*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

Comes now the plaintiff in proper person and presenting to the Court the Mandate of the Court of Appeals filed herein, prays judgment in conformity therewith, and it appearing by said Mandate that the judgment of this Court is thereby reversed with costs, it is hereby considered and adjudged, that the defendant herein recover of plaintiff Fifty-five Dollars and twelve cents ($55.12) for his costs on appeal herein and have execution thereof. Further, the verdict of this court and the judgment thereon of June 5th, 1908, are hereby set aside and a new trial of this cause is hereby awarded.

* * * * * * *

TUESDAY, *May* 17, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

Now come here as well the plaintiff by his Attorney Mr. John Ridout as the defendant by his Attorney Mr. William Henry White and a jury of good and lawful men of this District, to wit; Lemuel F. Lusby, Herbert Van Ness, Edward Stunkel, John C. Stoner,
9 Thaddeus Acton, Homer T. Booth, Robert E. Clements, Victor Anderson, James W. Hendley, Henry E. Hall, William S. Crown, William Miller Jr. who, being duly sworn to try the issue herein joined, and hearing the evidence, the plaintiff by his Attorney says he will not further prosecute the cause of action contained in the second count of his declaration and that the defendant go thereof without day as to said second count: whereupon the jury is respited until the meeting of the Court tomorrow.

* * * * * * *

WEDNESDAY, *May* 18, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

Come again the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday; whereupon the plaintiff by his attorney moves the Court for leave to file an amendment to his declaration here presented to the Court, which motion is granted, and said amendment is accordingly filed, and the defendant elected to stand upon his original plea; thereupon the jury, after the case is given them in charge on their oath say they find the issue aforesaid in favor of the defendant:

Whereupon counsel agree that judgment be entered forthwith:

Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff the costs of his defense, to be taxed by the Clerk, and have execution thereof.

10 The plaintiff by his Attorney in open Court notes an appeal to the Court of Appeals of the District of Columbia, and upon motion, the penalty of the bond on said appeal to act as a Supersedeas is hereby fixed in the sum of One hundred dollars ($100).

Amendment to Declaration.

Filed May 18, 1910.

The Plaintiff by leave of the Court Amends the Declaration in this Action by adding in line 6 after the words "in said City and District"—the following: "acquired from William R. Walker and Almea V. Davis by mesne conveyances and being another and different one half undivided interest from that claimed in and recovered in Cause No. 48112 at Law wherein this Plaintiff and the defendant is defendant" of which undivided one half interest, sued for in this action Plaintiff was seized at the time said cause 48112 was filed.

JOHN RIDOUT,
Attorney for Plaintiff.

Memoranda.

May 25, 1910.—Supersedeas bond approved and filed.

July 1, 1910.—Time to file record extended to August 15, 1910 inclusive.

11 Supreme Court of the District of Columbia.

MONDAY, *July* 18, 1910.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

Now comes here the plaintiff by his Attorney and prays the Court to sign and make part of the record his bill of exceptions taken at the trial of this cause (heretofore submitted) now for then, which is accordingly done.

12 *Bill of Exceptions.*

Filed July 18, 1910.

Be it remembered that on May 17, 1910, this cause came on for trial before Mr. Justice Wright and a jury, and the plaintiff to maintain the issues on his part joined, offered in evidence duly certified copy from the land records of the District of Columbia of a deed from Nathaniel Brady to William S. Walker, dated May 30, 1839, purporting to convey lot 7, square 834.

Plaintiff next offered in evidence the verdict and judgment in the case of Isaac S. Lyon vs. Isaac B. Bursey No. 48112, at law, which are hereinafter fully set forth, and next produced as a witness JOHN RIDOUT, who testified that he is the Attorney for the plaintiff in this cause, and was also attorney for the same plaintiff in said cause of Isaac S. Lyon vs. Isaac B. Bursey, No. 48112, at law, which was tried before Mr. Justice Wright and a jury on Nov. 17, 1909.

Witness Ridout further testified that he was present at the hearing; that at said trial plaintiff offered in evidence the above-mentioned certified copy of the deed from Nathaniel Brady to William S. Walker, dated May 30, 1839, purporting to convey Lot 7, Square 834; that evidence was given for the plaintiff to show that William S. Walker died intestate on July 1, 1844, and that in 1888 his only heirs and living descendants were his four children, Mary E. Walker,

13 Thomas D. Walker, William R. Walker and Almea V. Davis; that the defendant was in possession of the locus in quo prior to the institution of this suit, and claimed the same under an unrecorded deed which had been executed and delivered to him by Nellie M. Simmons, grantee of William B. Todd, survivor of Nathan B. Clark, deceased; that at said trial of said cause No. 48112, at law, the following had also been given in evidence by plaintiff for the announced purpose of proving a common source of title between plaintiff and defendant,—and that defendant by his counsel at said trial admitted that his title thus shown was defective.

Tax Deed from the Corporation of Washington to Samuel H. Platt, dated March 6, 1852, of lot 7, square 834, purporting to be made under a sale for taxes assessed against the property in the name of William S. Walker, for the years 1844, 1845, 1846, 1847 and 1848.

Tax Deed from the Commissioners of the District of Columbia to Frank J. Bramhall dated Dec. 23, 1873, purporting to be made under a sale for taxes assessed in the name of Samuel H. Platt.

Proceedings in Equity Cause No. 3036, in which Enoch Totten was appointed trustee to sell said lot 7, square 834, and other land, as the property of Samuel H. Platt, deceased.

Deed from Enoch Totten, trustee to William L. Bramhall, dated October 27, 1874, purporting to convey lot 7 square 834, in fee.

Deed from Frank J. Bramhall to Albert G. Hall dated Dec. 10, 1874.

Deed from Albert G. Hall to William L. Bramhall dated Dec. 20, 1875.

14 Deed from William L. Bramhall to Nathan B. Clarke, and William B. Todd, as joint tenants, dated March 8, 1877.

Deed from William B. Todd, as the survivor of said Nathan B. Clarke to Nellie M. Simmons, dated April 26, 1888.

Plaintiff then offered the following:

Deed from William R. Walker et ux., Eliza, to James B. Davis, dated May 18, 1888, conveying all of grantor's interest in lot 7, square 834, as one of the children and heirs at law of William S. Walker, deceased.

Deed from James B. Davis in his own right, and Almea V. Davis, as his wife, and from Almea V. Davis in her own right and James B. Davis as her husband, to Bartow L. Walker, and John H. Walter, dated May 10, 1890, conveying the interest of James B. Davis acquired by the preceding deed, and the interest of Almea V. Davis as one of the children and heirs at law of William S. Walker, deceased, in the locus in quo.

Deed from John H. Walter to Bartow L. Walker, dated May 10, 1890, conveying all of lot 7.

Deed from Bartow L. Walker to Paul J. Brandt, dated Nov. 1, 1894, conveying "all the right, title and interest of the grantor of, in, and to, all the real estate in the District of Columbia."

Counsel for plaintiff next introduced in evidence certified copy from the Land Records of the District of Columbia of a deed of trust from Paul J. Brandt, unmarried to Bartow L. Walker, Trustee, dated November 1, 1894, the material parts of which are as follows:

15 "This Indenture made this first day of November, in the year of our Lord, one thousand eight hundred and ninety-four, by and between Paul J. Brandt of Washington, D. C., the said Brandt being unmarried, of the first part, and Bartow L. Walker, trustee, party of the second part:

"Whereas, the said Paul J. Brandt is justly indebted unto Archibald C. Walter in the full sum of twenty-five thousand ($25,000) dollars, * * * payable in five years after date with interest thereon until paid at six per centum per annum, interest payable semi-annually.

"And Whereas, the party of the first part desires to secure the prompt payment of said debt * * *

"Now, Therefore, This Indenture Witnesseth, that the party of the first part, in consideration of the premises, and of one dollar * * * does by these presents give, grant, bargain and sell, alien, enfeoff, release and convey unto the party of the second part, his heirs and assigns, the following described land and premises, situate in the District of Columbia and designated as all the right, title and interest of the said party of the first part of, in and to all the real

estate in said District, together with all and singular the improvements * * *

"To Have and to Hold the said land * * * unto and to the only use of the party of the second part, his heirs and assigns, in and upon the trusts, nevertheless, hereinafter declared, that is, in trust to permit said Paul J. Brandt, his heirs or assigns, to use and occupy the said described land and premises and the rents, issues and profits thereof, to take, have and apply to and for his or
16 their sole use and benefit, until default be made in payment of said promissory note hereby secured, or any instalment of interest thereon, when and as the same shall become due and payable, or any proper cost, charge, commission or expense in and about the same. And upon the full payment of all the said note and the interest thereon, and all other proper costs, charges, commissions and expenses, at any time before the sale hereinafter provided for, to release and reconvey the said described premises unto the said Paul J. Brandt, his heirs and assigns, at his or their cost.

"And upon this further trust, upon any default or failure being made in the payment of said note * * * then and at any time thereafter, to sell the said described land and premises, at public auction * * * and to convey the same in fee simple to and at the cost of the purchaser * * * and of the proceeds of said sale or sales, firstly, to pay all proper costs, charges and expenses, including all taxes, * * * and to retain as compensation a commission of three per centum on the amount of the said sale or sales; secondly, to pay whatever may then remain unpaid of the said note and the Interest thereon, * * * and lastly, to pay the remainder of said proceeds, if any there be, to said Paul J. Brandt, his heirs and assigns." * * *

Acknowledged before a Notary Public December 11, 1894.

Recorded December 11, 1894, at 10:44 a. m. in Liber 1967, folio 346.

17 Copy of the charter of the Virginia Alabama Company, a corporation, duly certified, incorporated in Virginia prior to Dec. 29, 1894, purporting to authorize it to acquire, hold, sell and convey real estate in the District of Columbia.

Deed from Paul J. Brandt to Virginia Alabama Company, dated Dec. 29, 1894, recorded Dec. 29, 1894, conveying "all the right, title, and interest of the grantor of, in, and to, all the real estate in the District of Columbia."

Counsel for plaintiff next offered in evidence certified copy from the Land Records of the District of Columbia of a deed of release dated December 29, 1894, from Bartow L. Walker, trustee, to the Virginia Alabama Company, a corporation, the material parts of which are as follows:

"Know All Men by These Presents: That Bartow L. Walker, trustee under a certain deed of trust from Paul J. Brandt dated November 1, 1894, and recorded December 11, 1894, in Liber 1967, folio 346, et seq., of the Land Records of the District of Columbia, in consideration of one dollar current money to him in hand paid by the Virginia Alabama Company, a corporation duly created and

existing under the laws of the State of Virginia, receipt whereof, before the delivery of these presents, is hereby acknowledged, has released, remised and conveyed, and does hereby release, remise quitclaim and convey unto the Virginia Alabama Company, heirs and assigns, the following described land and premises situate, lying and being in District of Columbia and distinguished as all the property described in the above trust and dated and recorded as aforesaid.

18 "To Have and to Hold the same with the appurtenances unto and to the use of the said company, it- successors and assigns forever, fully released and discharged from the effect and operation of said deed of trust, the party secured thereby having been fully paid.

"Witness my hand and seal this 29 day of December, A. D. 1894.

BARTOW L. WALKER, *Trustee.* [SEAL.]"

Acknowledged before Notary Public December 29, 1894.
Recorded December 29, 1894, in Liber 1984, folio 27.

Counsel for plaintiff next offered in evidence certified copy from the Land Records of the District of Columbia of a deed from the Virginia-Alabama Company dated June 6, 1896, purporting to convey, among other property, an undivided moiety in said Lot 7, Square 834, to Michael J. Colbert, Leo Simmons, and John Ridout, trustees appointed by decree in Equity Cause No. 16513, with full power to make partition of said lot with the owner of the other moiety.

Counsel for plaintiff next offered in evidence certified copy from the Land Records of the District of Columbia of a deed dated March 10, 1903, from Michael J. Colbert, Leo Simmons and John Ridout, as trustees under the decree in Equity Cause No. 16513, and under the deed from the Virginia-Alabama Company to Michael J. Colbert, Leo Simmons and John Ridout, trustees, purporting to convey the property involved in this suit to Isaac S. Lyon, and reciting that the object of the deed is to make a division by the mutual ex-

19 change of deeds so that said trustees and said Lyon may hold in severalty.

Thereupon the plaintiff offered in evidence the following docket and minute entries and declaration, to wit:

Docket Entries (48112).

1905, Nov. 16. Appearance,—Order, declaration and notice filed.
" Dec. 6. Appearance,—Summons for defendant's pleas (separate) not guilty filed.
" " 11. Joinder,—Note of issue and notice of trial filed—calendared.
1906, June —. Jury sworn and respited.
" " 12. Verdict for defendant.
" " 14. Motions for new trial and in arrest of judgment filed and entered.

"	"	18.	Motion to strike out verdict and for non-suit filed.
"	"	21.	New trial granted as to defendant Bursey and motions for new trial and in arrest overruled as to defendant Simmons and judgment on verdict in her favor for costs.
1907, Mar.		4.	Jury sworn as to defendant Bursey and respited.
"	"	5.	Leave to file amended declaration granted—pleadings to original declaration to stand as pleadings to amended declaration.
"	"	5.	Verdict for plaintiff.
		7.	Motion for new trial filed and entered.
"	"	22.	Motion for new trial overruled and judgment on verdict for plaintiff for possession and costs,—appeal noted—bond filed at $100.00.
"	Aug.	17.	Bill of exceptions signed and filed.
1908, Apr.		1.	Mandate Court of Appeals reversing judgment with $62.40 costs filed.
"	Dec.	18.	Judgment for defendant for $62.40, costs of appeal and new trial ordered.
1909, Mar.		17.	Jury sworn as to Bursey—verdict for plaintiff for possession.
"	"	23.	Judgment on verdict for plaintiff for possession and costs.

20 *Declaration.*

Filed November 16, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 48112.

ISAAC S. LYON
vs.
ISAAC B. BURSEY and NELLIE M. SIMMONS.

The plaintiff, Isaac S. Lyon, sues the defendants, Isaac B. Bursey and Nellie M. Simmons, to recover possession of all that piece or parcel of land premises situate on Fifth street, northeast, in the City of Washington, District of Columbia, and known and designated as the north half of original lot numbered seven (7) in square numbered eight hundred and thirty-four (834), in said city and District, in all of which the plaintiff claims an estate in fee simple and of which he was lawfully seized and possessed on or about, to wit: the 1st day of October, 1905, when the defendants entered the same and unlawfully ejected the plaintiff therefrom, and wrongfully entered into possession of the same, and thenceforward have wrongfully detained and still wrongfully detain the same from the plaintiff, and are wrongfully exercising acts of ownership thereon, and the plaintiff is entitled to possession thereof. And the plaintiff claims pos-

session of said described land and premises with the improvements and appurtenances, besides costs of suit.

And plaintiff sues the defendants for rent, use and occupation and for mesne profits of said piece or parcel of land and premises situate on Fifth street, northeast, in the City of Washington,
21 District of Columbia, and known and designated as the north half of original lot numbered seven (7) in square numbered eight hundred and thirty-four (834) from, to wit: the 1st day of October, 1905.

And plaintiff claims $300, besides costs of suit.

ISAAC S. LYON, *Plaintiff.*

Now comes the defendant, Isaac B. Bursey, and for plea to the plaintiff's declaration says he is not guilty as alleged.

LEO SIMMONS,
Attorney for Defendant.

Filed Dec. 6, 1905.

The plaintiff joins issue upon the plea of defendant, Isaac B. Bursey.

ISAAC S. LYON, *Plaintiff.*

Filed Dec. 11, 1905.

Amended Declaration.

In the Supreme Court of the District of Columbia.

Filed March 5, 1907.

At Law. No. 48112.

ISAAC S. LYON
vs.
ISAAC B. BURSEY.

The plaintiff, by leave of the court, files this Amended Declaration, as follows:

22 The plaintiff, Isaac S. Lyon, sues the defendant, Isaac B. Bursey, to recover possession of an undivided one-half of all that piece or parcel of land and premises situate on Fifth street northeast, in the City of Washington, in the District of Columbia, and known and designated as the north one-half of original lot numbered seven, square numbered eight-hundred-and-thirty-four, in said city and District, in which the plaintiff claims an estate in fee simple, and of which he was possessed, on, to wit, the first day of October, 1905, when the defendant wrongfully entered the same and wrongfully ejected the plaintiff therefrom, and thenceforward has wrongfully detained, the same and still detains the same from the plaintiff, and the plaintiff is entitled to possession of said undivided one-half interest. And the plaintiff claims the possession of said one-half un-

divided interest in said described land and premises besides costs of suit.

JOHN RIDOUT,
Attorney for Plaintiff.

Minute Entries.

1907.
March 5. Minutes 48, page 339.

Come again the parties hereto aforesaid, in manner aforesaid and the same jury that was respited yesterday. Thereupon the plaintiff by his attorney moves in open court for leave to file an amended declaration herein forthwith, which is granted, and said amended declaration filed; further it is ordered that the plea and
23 replication filed herein to the declaration stand as to said amended declaration; thereupon the jury are given the case in charge and upon their oath say they find in favor of the plaintiff herein for possession of an undivided one-half interest in the north one-half of lot seven, in square eight-hundred-and-thirty-four, in the City of Washington, in the District of Columbia.

March 22. Minutes 48, page 365.

Upon consideration of the motion for a new trial herein and heretofore submitted to the court, it is ordered that said motion be and the same is hereby overruled, and judgment on verdict is ordered. Thereupon it is considered and adjudged that the plaintiff herein recover of the defendant, Isaac B. Bursey, possession of an undivided one-half interest in the north one-half of lot seven in square eight-hundred-and-thirty-four (834), in the City of Washington, in the District of Columbia, and the costs of suit to be taked by the Clerk and have execution thereof. From the foregoing the defendant by his attorney in open court noted an appeal to the Court of Appeals. Whereupon a bond for costs is fixed in the sum of one-hundred dollars.

1908.
Dec. 18. Minutes 52, page 96.

No. 48112. At Law.

ISAAC S. LYON, Plaintiff,
vs.
ISAAC B. BURSEY, Defendant.

Comes now the defendant by his attorney and presenting to the Court the mandate of the Court of Appeals of the District of
24 Columbia, prays judgment in conformity therewith, thereupon it appearing that the judgment of the Court of March 22, 1907, is by said mandate reversed with costs, it is considered and adjudged that the defendant recover of plaintiff the sum of sixty-

two dollars and forty cents ($62.40), for his costs on appeal, and have execution thereof. Further, the verdict and judgment entered herein by this court are hereby set aside and vacated, and a new trial of this cause is hereby ordered.

1909.
Nov. 17. Minutes 53, page 81.

At Law. No. 48112.

ISAAC S. LYON, Plaintiff,
vs.
ISAAC B. BURSEY and NELLIE M. SIMMONS, Defendants.

Now come here as well the plaintiff by his attorney Mr. John Ridout, as the defendant Isaac B. Bursey by his attorney Mr. William Henry White and a jury of good and lawful men of this District, to wit: Jesse Jenkins, Oscar Baker, Benjamin Sebastian, William E. Thomas, James A. Killiper, Douglas Brewer, Harry L. Myers, Charles W. Heider, Thomas W. Buckey, Robert E. Bradley, George E. Kent, Samuel Fischer, who being duly sworn to try the issue joined in this cause between the plaintiff and said defendant Isaac B. Bursey, on their oath say they find said issue in favor of the plaintiff for possession of the property in controversy.

25 Nov. 23.

At Law. No. 48112.

ISAAC S. LYON, Plaintiff,
vs.
ISAAC B. BURSEY and NELLIE M. SIMMONS, Defendants.

The time in which for defendant Isaac B. Bursey to move for a new trial being expired, judgment on verdict is ordered. Therefore, it is considered that the plaintiff recover against said defendant, Isaac B. Bursey, possession of all that piece or parcel of land situate in the City of Washington, District of Columbia, known and described as an undivided one-half of "all that piece or parcel of land and premises situate on Fifth street north-east in the City of Washington, in the District of Columbia, and known and designated as the north one-half of original lot numbered seven, in square numbered eight-hundred-and-thirty-four, in said city and District" together with his costs of suit, to be taxed by the Clerk and have execution thereof.

Whereupon plaintiff rested.

Counsel for defendant thereupon moved the court to instruct the jury to return a verdict for the defendant on the sole ground that plaintiff's recovery of an undivided one-half interest in the property in question in cause No. 48112 was a bar to any further recovery in this cause.

Whereupon counsel for plaintiff while said motion was pending, by leave of the court, amended his declaration in this cause by withdrawing the second count of his declaration relating to mesne
26 profits, and by adding to said declaration in line 6, after the words in said City and District the following:

"acquired from William R. Walker and Almea V. Davis by mesne conveyances and being another and different one-half undivided interest from that claimed in and recovered in cause No. 48112, at law, wherein this plaintiff is plaintiff, and this defendant is defendant, of which undivided one-half interest sued for in this action, plaintiff was seized at the time said cause 48112 was filed."

It was at this point agreed between counsel that the undivided interest involved in said cause 48112, at law, was another and different interest from that involved in this cause, and was derived from Thomas D. Walker and Mary E. Walker, whereas the undivided interest involved in this cause was derived from William R. Walker and Almea V. Davis, and counsel for defendant thereupon announced that he stood by his original plea of "not guilty."

Whereupon the Court instructed the jury to find for the defendant for the reason stated in defendant's motion.

To which ruling counsel for plaintiff duly excepted.

Thereupon the jury rendered a verdict for the defendant.

The foregoing Bill of Exceptions contains all the evidence in the case.

The foregoing exception was duly reserved and noted by the Justice presiding, upon his minutes before the jury retired to
27 consider of their verdict, and the plaintiff prays the court to sign the bill of exceptions now for then, in order that the same may be made matter of record, which is accordingly done this 18 day of July, 1910.

DANIEL THEW WRIGHT, *Justice.*

Directions to Clerk for Preparation of Transcript of Record.

Filed July 20, 1910.

The Clerk will include in the transcript of record on appeal herein, the following:

1. Declaration. 2. Plea. 3. Joinder of Issue. 4. Memorandum of verdict at first trial. 5. Memorandum of judgment at first trial. 6. Memorandum of appeal at first trial. 7. Memorandum of exceptions filed at first trial. 8. Memorandum of mandate reversing judgment. 9. Memorandum of judgment on mandate. 10. Memorandum of verdict, and judgment set aside, and new trial ordered. 11. Jury sworn and non-suit as to second count, and jury respited (53-285). 12. Leave granted plaintiff to amend declaration, (53-286). 13. Amended declaration—plea thereto of not guilty—verdict for defendant, and judgment and appeal noted (53-286). 14. Memorandum of appeal bond filed. 15. Bill of Exceptions. 16. Time to file record extended to August 15, 1910—Mem.

JOHN RIDOUT,
For Plaintiff.

28 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 27, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49305 at Law, wherein Isaac S. Lyon is Plaintiff and Isaac B. Bursey is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 2d day of August, 1910.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF G. BUHRMAN, *Ass't Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2201. Isaac S. Lyon, appellant, vs. Isaac B. Bursey. Court of Appeals, District of Columbia. Filed Aug. 6, 1910. Henry W. Hodges, clerk.

In the Court of Appeals of the District of Columbia

No. 2201

ISAAC S. LYON, Appellant,

vs.

ISAAC B. BURSEY, Appellee.

BRIEF FOR APPELLANT

ISAAC S. LYON,
Appellant.

SAXTON PRINTING CO., WASHINGTON, D. C.

In the Court of Appeals of the District of Columbia

No. 2201.

ISAAC S. LYON, APPELLANT *vs.* ISAAC B. BURSEY, APPELLEE.

STATEMENT.

This is an action of ejectment to recover possession of an undivided half part of the north half of lot 7, square 834.

Both parties in the suit claim under William S. Walker, as common source, who in 1844, and prior thereto, was the owner of the entire lot, and died intestate leaving four heirs, Thomas D. Walker, Mary E. Walker, William R. Walker and Almea V. Davis.

In 1888-9 plaintiff acquired by direct purchase the shares or interests of two of these heirs, viz: Thomas D. Walker and Mary E. Walker, while the shares or interests of the other two heirs (William R. Walker and Almea V. Davis) were conveyed to other parties.

These two holdings, each of an undivided half of the entire lot, existed separately for 15 years, or until 1903, when the title stood an undivided half in plaintiff, and an undivided half in Colbert, Ridout and Simmons, trustees in a certain equity cause.

In that year (1903) by a mutual exchange of deeds between plaintiff, as owner of the moiety derived from Thomas D. Walker and Mary E. Walker, and the three trustees then owners of the moiety derived from William R. Walker and Almea V. Davis, the title of the

specific north half of the lot became vested in plaintiff, he surrendering his interest in the south half therefor. Subsequently defendant took possession of plaintiff's portion under a tax title, and these ejectment suits followed.

The first suit (48,112) was originally brought Nov. 16, 1905, to recover the specific north half of said lot, and two trials with that end in view were had in the lower court; but at the second trial it was established that there were two separate and distinct interests in issue in the case, each requiring different and independent proof, one interest acquired by plaintiff directly from Thomas D. Walker and Mary E. Walker, two of the heirs of the common source and easy of proof, while the other interest derived from Wm. R. Walker and Almea V. Davis, the remaining heirs of the common source, had become complicated with many transfers, a mortgage debt, a foreign corporation holding and finally entangled in an equity cause where trustees in a certain equity suit had conveyed to plaintiff. It also appeared that these two interests were so unlike, as that they reached plaintiff through distinct and independent lines of conveyance 15 years apart, and required different proof to support each, three deeds being required to support one interest, and nine deeds and a foreign charter to prove the other interest, and no two alike.

So at the second trial of No. 48,112 (March 5, 1907), after a ruling by the trial judge against the sufficiency of the very last one of the title deeds to plaintiff, that from the trustees in the equity cause, referred to, involving the interest acquired from Wm. R. Walker and Almea V. Davis, and being the interest now claimed in this cause, the question presented itself whether plaintiff should accept the judgment upon the interest proved, which the court was willing to give him and seek relief in another action for the other interest or keep both together and suffer utter defeat on all through this (what afterwards proved) erroneous ruling. In this dilemma plaintiff was obliged to withdraw the interest now claimed in 49,305 from the cause then on trial, and accept a verdict for the interest derived from Thomas D. Walker and Mary E. Walker, and bring a new action for the other interest.

Accordingly an amended declaration was filed, which the court allowed (R. 12), limiting the claim to the part or interest duly proved, that derived from Thomas D. Walker and Mary E. Walker and directed a verdict for plaintiff therefor.

Plaintiff thereupon brought the present action as No. 49,305, at law (March 26, 1907), to recover the part or interest not before proved in No. 48,112, which came from the entirely different ownership, viz: the three trustees who had acquired the share or title of William R. Walker and Almea V. Davis, and thenceforth the actions became separate.

It should be added that five months after the present suit was filed, and while the two suits were both pending, defendant perfected an appeal to this court (Aug. 17, 1907), from the verdict against him in 48,112 (R. 11) and procured a reversal of the same, and a new trial. Yet when the present cause, 49,305, came on for its first trial (May 26, 1908), the then trial judge sustained the sufficiency of the very title deed which had previously been ruled against, and which had occasioned the new suit, and on appeal by defendant, in which that very title deed was an issue, this court also sustained the sufficiency of the same title deed. Moreover, at the last trial of this present suit, the sufficiency of the same title deed was again in issue, and was sustained by the then trial judge, circumstances which establish the necessity and wisdom of bringing a second suit for the part ruled against.

Thus from and after March 26, 1907, and until Nov. 17, 1909, when recovery was had in No. 48,112, a period of more than $2\frac{1}{2}$ years, two suits, Nos. 48,112 and 49,305, were pending and being tried side by side, without objection, both in this court and in the court below, for the possession of different parts of north half of lot 7.

The following shows the various actions taken:

Nov. 16, 1905, suit 48,112, was filed for a specific north half lot 7.

June 12, 1906, first trial of 48,112; verdict for defendant; new trial.

March 5, 1907, second trial of 48,112; amended declaration claiming undivided half interest.

March 26, 1907, suit 49,305 filed for other undivided half of north half; plea, not guilty.

May 26, 1908, first trial of 49,305; verdict for plaintiff; reversed.

Nov. 17, 1909, third trial of 48,112; verdict for plaintiff; no appeal.

May 17, 1910, second trial of 49,305; present appeal.

When suit 49,305 was filed (March 26, 1907), for one-half interest in the property, the other suit (48,112), was pending for the other interest; yet, in face of such fact, defendant did not raise the question of prior or pending suit by plea in abatement or otherwise, when he came to plead, but pleaded simply "not guilty." Moreover, at the first trial of No. 49,305, on May 26, 1908, before a jury, in the court below, and afterwards on appeal to this court, no mention was made of suit 48,112 being then pending, although such was the fact, and no defense was sought by reason of such fact.

So, also, after *recovery* in 48,112, on Nov. 17, 1909, which was after issue joined in the present suit, this former recovery was neither pleaded *puis darre* in continuance nor during the last trial was it offered in evidence by way of estoppel, nor any intimation given that such recovery would be offered in defence until at the very end of the last trial of 49,305 on May 17, 1910, when, overruled on every other point, and without an iota of evidence offered in his behalf, and otherwise utterly defeated on the merits, counsel for defendant moved the court to instruct the jury to return a verdict for the defendant "on the sole ground that plaintiff's recovery of an undivided one-half interest in the property in question in cause No. 48,112, was a bar to any further recovery in this cause."

Thereupon in order to make it clear what particular interest in the property was claimed in the present suit, and to distinguish it from the part claimed and already recovered in 48,112, plaintiff amended his declaration by alleging that the interest now in suit was the interest "acquired from Wm. R. Walker and Almea V. Davis, and was another and different one-half undivided interest from that claimed in and recovered in case 48,112" (R. 15), and defendant then and there, apparently for the

purpose of emphasizing this statement and of avoiding any misunderstanding or confounding of these interests in the future, agreed "that the undivided interest involved in said cause 48,112, was *another* and *different* interest from that involved in this cause (49,305), and was derived from Thomas D. Walker and Mary E. Walker, whereas the undivided interest involved in this cause was derived from William R. Walker and Almea V. Davis" (R. 15), counsel for defendant standing upon his original plea of "not guilty."

Nothing was offered to the court or jury in support of this motion, not even the record in 48,112, nor any aid or explanation or parole proof or extrinsic evidence showing the identity of the two causes of action or parties, or what points or facts were actually considered and decided in the former trial; yet the court granted the motion over the objection of plaintiff, notwithstanding the defendant's counsel had previously admitted of record that the interest claimed in the present suit was an entirely different interest from that claimed in the prior suit, and derived from a different source. In other words, defendant simply asked that this suit be barred by reason of a former recovery of a *different* interest in the property, and without giving any further reason therefor it was done.

ASSIGNMENT OF ERROR.

The court erred in instructing the jury to return a verdict for the defendant "on the sole ground that plaintiff's recovery of an undivided one-half interest in the property in question in cause 48,112 was a bar to any further recovery in this cause."

In not overruling the motion, because embodying a new defence arising after last pleading, and not pleaded.

In instructing the jury to find contrary to the issues joined and pleadings.

In assuming the province of the jury in deciding the facts upon which such former recovery of an interest becomes operative as a bar.

In not having the facts as to identity, character, proof,

and entirety of the demands in each cause, first submitted to and determined by the jury.

In not holding that the causes of action as well as the interests claimed in both suits were not the same, and overruling the motion, after admission by defendant that they were not the same but different.

In making former recovery a bar, simply upon motion of defendant.

FORMER RECOVERY AS NEW ISSUE NOT SUBMITTED TO JURY.

This appeal seeks to reverse the action of the court below, whereby a former recovery of an interest in the property was permitted *on motion* to operate as a bar to further recovery in the present action; presenting the question whether defendant can avail himself of new matter, such as former recovery as a bar, simply by motion therefor, made at the end of a long trial, without previously pleading it, or offering it in evidence or making it an issue before the jury, or any showing of the questions actually litigated in the former trial; in other words, by simply asking the court for it, instead of proving himself entitled to it.

After plaintiff had completed his testimony and rested, defendant without a word of evidence in his own behalf, simply moved the court verbally to instruct the jury to find for the defendant, not on the ground that plaintiff had not shown any title in himself, or that defendant had proved the better title, but on the *"sole ground"* that the plaintiff's recovery of an interest in the property in a previous suit, was a bar to his further recovery of an admitted different interest in the present suit (R. 14). This motion the court granted over plaintiff's objection.

Defendant having interjected into the case this new issue of former recovery of a part of the property by motion at the end of the trial, was bound to prove to the jury whether the original demand was so entire and indivisible in its nature, as to bar this present action, with opportunity to plaintiff to adduce evidence in reply.

If the former judgment was relied upon rather than title to defeat plaintiff's claim, the question first to have

been decided was whether the two suits formed a single cause of action, whether the claim now in issue was a part of an entire indivisible demand; and it was necessary that some sort of proof should have been submitted to the jury showing what points of the present case were actually adjudicated in the former suit, and some sort of finding by them on the subject. This was not done. The court in effect decided an issue of fact in granting the motion on which plaintiff could have taken issue. The facts upon which recovery was had in 48,112 should have been presented to the jury by the defendant to enable them to be compared with the facts presented in 49,305, so that the jury could have determined what sort of demand it was, how related to the present one, how acquired, and other facts bearing on the question of their entirety. This was not done. The muniments and sources of title under which plaintiff recovered in 48,112 were not shown. Not a single deed or conveyance from the various grantors to plaintiff in the former recovery was referred to or set out in the present suit. Nowhere in the record does it appear that the identity of these two actions was pointed out or made an issue before the jury. So that the jury did not find this present suit to be a part of an entire demand, so as to produce an estoppel or bar, because no facts or evidence at issue in the first trial were submitted to them. It was a question of fact.

The motion is uncertain in its meaning. It does not point out the relation or connection of the interest recovered, with the interest in the present suit, whether the present suit is for identically the *same* interest as was embraced in the former suit, and therefore barred, or whether for *another part* of the same interest or demand, and therefore barred. So we are obliged to cast about to discover which was meant and what was meant—facts for the jury.

That question could not properly be determined simply on motion to have the jury instructed to find for defendant, because of a former recovery.

In Briggs vs. Wells, 12 Barb. N. Y., 570, ejectment case, the court said:

"The mere record of the former recovery es-

> tablishes nothing in favor of the defendant, without parol proof on his part showing what title was established in that action. Without such parol proof, there is nothing to show that the title set up either by the plaintiff or the defendant is the same in both suits. For ought that would appear, both parties may now be claiming under entirely different titles."

Claiming under a common source does not establish that there is but a single cause of action. There are a dozen titles between common source and the end of the chain, every one of which in this case had to be separately litigated and proved by separate and independent evidence. Recovery of one interest can form no defence to the recovery of another admittedly different interest, whether these interests are halves or quarters. A different state of facts was required to support the present action.

> "The identity of the causes of action is a question of fact to be determined by the jury upon the evidence adduced." Green'l on Ev., 332.

> "It is not the province of the court to withdraw such question (of fact) from the jury by an instruction or upon motion of a party." Amsden vs. R. R. Co., 32 Iowa, 292.

Nothing was offered in evidence in bar of this action, neither the record or verdict or judgment in the former case was presented to the jury.

No one is able to assert that this was an entire demand until the jury find it as a fact.

In this case it ought to appear as a fact found by a jury whether the interest claimed in the second action arose from a single and independent demand.

Greenleaf on Evidence, Lewis Ed., Sec. 532:

> "When a former judgment is shown by way of bar, whether by pleading or in evidence, it is competent for the plaintiff to reply that it did not re-

> late to the same property or transaction in controversy in the action to which it is set up in bar, and the question of identity thus raised, is to be determined by the jury upon the evidence adduced."

In Snider vs. Von Vorten, 2 Johns, 229, the court said:

> "A recovery in a former action apparently for the same cause, is only prima facie evidence that the subsequent demand has been tried, but it is not conclusive."

Even the verdict and judgment in the former case does not determine how far these actions are identical.

The record in 48,112, if offered in evidence, would have decided nothing except that plaintiff sued for and recovered the one-half undivided interest derived from Thos. D. Walker and Mary E. Walker.

It would not have disclosed what sort of an interest remained or how derived, or any proof of the interests being identical.

> "This identity (of subject matter) is determined not by the pleadings only, but when submitted to the jury, by parol proof; it would be wholly illusory to make the identity of a cause of action depend on the form of pleading, instead of the facts given in evidence." Whitehurst vs. Rogers, 38 Md., 515.

After this admission by defendant as to the difference of interests in the two suits, the question is not whether separate suits can be brought upon the same demand, but whether former recovery of a specific interest in a piece of property is a bar to a recovery of another and admitted *different interest* in the same property in another action.

Former recovery whether based upon a part of an entire demand or upon causes of action which are the same, are governed by the same general principles as to the necessity of the jury passing upon the material facts, and the law in this regard has been settled by the U. S. Supreme Court.

In Sickles vs. Packet Co., 5 Wall., 580, the court said:

> "As we understand the rule in respect to conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel or is relied on by way of evidence as conclusive *per se, it must appear* by the record of the prior suit that the *particular controversy* sought to be concluded, was necessarily tried and determined. * * * and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, *if it be not shown* that the verdict and judgment *involved its consideration and determination,* it will not be concluded."

The Supreme Court, p. 493, even prescribed the kind of extrinsic proof requisite to go to the jury in such case, saying:

> "The evidence should be confined to the points in controversy in the former trial, to the testimony given by the parties, and the questions submitted to the jury for their consideration, and then the record furnishes the only proper proof of the verdict."

Taking this opinion of the Supreme Court as a guide, we find that the particular controversy sought to be concluded in this case, is the further recovery by plaintiff of the interest in the property derived from William R. Walker and Almea V. Davis, the interest not recovered in the former suit. The Supreme Court says, in such case "*it must appear* by the record of the prior suit" that this particular controversy sought to be concluded, was necessarily *tried and determined* in the prior case.

Now, no such thing appears by the record, and no such issue was tried in the former case.

There is nothing in the record which shows that plaintiff claimed in the prior suit any interest in the property aside from the interest derived from Thomas D. Walker and Mary E. Walker, or that any one of the nine conveyances or the Va. Ala. Co. charter, on which plaintiff's further recovery was based in the present suit, was even referred to, must less produced in the prior suit, or that the two actions are upon an entire and indivisible demand.

The Supreme Court says further that where the record does not show that the matter (referred to above) *was found* by the (former) jury, evidence *aliunde* as to the points in controversy in the former trial, as to the testimony given by the parties, and the questions submitted to the jury for their consideration, may be received to prove the fact. This was not done.

But the most effective part of the Supreme Court's decision is this:

> "But even where it appears from the extrinsic evidence that the matter (of the second suit) *was* properly within the issue controverted in the former suit, if it *be not shown* that the verdict and judgment *involved its consideration and determination,* it will not be concluded."

Now in this case, the record of the former trial was not offered to the court or jury, no extrinsic evidence was presented, no showing of points in controversy or the testimony given by the parties or the questions submitted to the former jury for their consideration. Hence upon the authority of the Supreme Court, the former recovery is not a bar, and does not conclude this second suit.

FORMER SUIT (48,112) WHILE PENDING, NOT PLEADED IN ABATEMENT.

When the present suit (49,305) was filed, the prior suit, 48,112, was pending, and if defendant desired any benefit from that fact, he should have pleaded this prior

suit in abatement, pointed out plaintiff's error, and given him an opportunity to remedy the defect—called a better writ. Instead thereof, he joined issue on the merits by plea of "not guilty." By this plea he put in issue plaintiff's title and right of possession, and thereby gave notice to plaintiff that that would be his sole defense; yet he allowed this second suit to be three times brought to trial before suggesting any other defense.

This second suit if in conflict with the first, should have been summarily assailed and plaintiff's right to bring it impugned, unless it was defendant's purpose to have it hold its place and abide a trial on the merits.

Upon suit 49,305 being filed, defendant had two defenses to it; one by plea of "not guilty" putting in issue plaintiff's title and right of possession; the other by plea in abatement, putting in issue the right of plaintiff to bring a second suit during the pendency of another for the same cause of action, if such it was, one defense being upon the merits, the other to the disability of plaintiff, impugning his right to sue at all.

When defendant pleaded in 49,305, he had the choice of defenses, and he took issue on the facts rather than by plea in abatement, the effect of which was to require plaintiff to establish his title to the part lot claimed, succeeding in which he was entitled to recover.

> "The pendency of another suit for the same cause of action must be pleaded in abatement of a suit subsequently commenced." Nicholl vs. Mason, 7 Wend., 341; 7 Gill, 415.

In a court of general jurisdiction the personal disability of the plaintiff to sue, can only be taken advantage of by plea in abatement. 26 Md., 380. The right to plea in abatement is waived by a subsequent plea to the merits.

Law, Rule 28, provides that—

> "Every plea shall set forth the true defense upon which the defendant supposes he may defeat the plaintiff's action," and that defendant shall plead to the disability of plaintiff before he pleads to the declaration.

While such plea in abatement, if successful, would have defeated plaintiff's second action, or an abandonment of the first, yet with the right of suit still remaining, and the suggestion of a better writ by such plea, plaintiff would have been enabled to have discontinued his prior suit, or both suits, and begun anew or taken other action without loss of any right, which cannot now be done. Such plea would have protected defendant from vexatious litigation, if such it was.

If as defendant contends, plaintiff had two suits pending against him for the same cause of action, why did he not have the second abated? The existence of the first is ground for abating the second. Why complain now for the first time of this second suit, instead of when it was first filed March 26, 1907? The fact that defendant pleaded the general issue to the second suit and not abatement, and stood by that plea when these suits were pending side by side for two and one-half years and during one trial of 48,112, in the lower court, and one trial of same on appeal, also one trial of 49,305 in lower court (not counting the last trial of 49,305) without even hinting at the defense embodied in the motion now in issue, is proof positive that he acquiesced in that defense and waived his right to any other, and he should not change it now by this motion.

It would present a singular result if defendant failing to plead in duty bound and giving notice to plaintiff of his true defense should be allowed to prevail through such misleading practice.

It is a well settled rule of practice that a defendant by pleading to the merits waives matters in abatement.

If defendant saw fit to go to trial three times upon the merits through the plea of "not guilty" in the face of this prior pending suit, and not plead it, he should stand upon the merits now. The fact that plaintiff did not make this pending suit an issue, is proof that he did not *intend* to make it an issue. He has by his action consented to the institution of separate actions instead of a single one, and has waived the benefit of any other result than a verdict on merits. Having thus experimented without suggesting the defense of a prior pending suit, he is estopped from making such defense by motion now.

In 1 Peters, 317, in a suit against one partner, where it should have been brought against all, the Supreme Court said:

> "If, therefore, the defendant fail to avail himself of the variance in abatement when the form of his plea obliges him to give the plaintiff a proper action, the policy of the law does not permit him to avail himself of it at the trial."

FORMER RECOVERY AS NEW DEFENCE ARISING AFTER ISSUED JOINED, NOT PLEADED.

As a result of the allowed amendment of suit 48,112 during its trial, March 5, 1907, limiting that action to an undivided half interest, the present suit, No. 49,305, was brought (March 26, 1907), for the other undivided half interest in the property.

After issue had been joined in the present suit (49,-305), and it had been pending alongside of No. 48,112 for more than 2½ years and had been twice tried without any plea being interposed, to the further maintainance of the present suit, the former suit, 48,112, was tried and judgment recovered by plaintiff for a one-half undivided interest—no appeal.

It then became the duty of defendant to plead this recovery in bar of the further prosecution of this present action, if he intended to make it an issue or desired its benefit as a defence. Instead thereof he awaited the third trial of the present suit on its merits and failing therein he, *by motion,* asked the court to instruct the jury to return a verdict for the defendant on the sole ground that plaintiff's recovery of an undivided one-half interest in property in question in cause No. 48,112, was a bar to any further recovery in this cause.

His action was a *motion* in bar, in place of his omitted plea in bar, an unheard of proceeding, and plaintiff insists that this matter after issue joined, could not be the subject of a motion, and not having been previously pleaded, was improperly presented and the court's action thereon was error.

This former recovery then became new matter arising

after issue joined in present suit, and required to be pleaded *puis darrein* continuance. There existed no technical reason to prevent defendant from pleading this former judgment and alleging that it arose after issue joined, and that it involved the same subject matter, or a part of the same demand as that for which the second suit was brought.

This plea not having been pleaded, defendant thereby waived the right to such defence, and the attempt to introduce into this case at the end of a long trial a new issue such as this, by motion instead of by plea duly pleaded, was improper and should have been overruled.

In Sincell vs. Davis, 24 App. D. C., 218, in a case where judgment had been recovered in a split action and where the bringing of a second suit was sustained, this court said:

> "It is very plain that that judgment should have been pleaded in bar of this action, if appellant desired to have a benefit of it."

The rule is that any matter of defence arising after the commencement of a suit and after issue joined, to be available, must be pleaded *puis darrein* continuance.

Rule 42 of the Supreme Court, D. C., provides:

> "If a matter of defense has arisen since the last pleading filed, the party may plead the same in addition to his former defense," and that an affidavit of its truth must accompany such plea, unless the court otherwise order.

> "Matter of defence arising after issue joined must be pleaded *puis darrein* continuance. This rule applies as well to ejectment as to other actions." Jackson vs. Ramsey, 3 Cowan, 75.

> "That the general rule requiring matter of defence which has arisen after issue joined to be pleaded *puis darrien* continuance is applicable to this (ejectment) as well as other actions, is abundantly settled in this court." Jackson vs. Ramsey,

> 3 Cowan, 75, citing 7 Johns, 194; 9 Johns, 60; 11 Johns 424; 19 Johns, 168.

That motion assumed every characteristic of a special plea in bar. It set up new matter by way of defence to the action after issue joined. Under this motion, the legal effect and operation of the former recovery became the matter of defence, and not the title itself. It ignored the plea and defence already made as to title and right of possession. According to plaintiff's motion, the case lost its identity as an ejectment suit, and became a case sounding in split action. Title and right of possession was no longer an issue, but the question turned into whether plaintiff's recovery of a part bars him from recovering another part. It was not an answer to anything alleged, but a new defence which goes to the whole action and seeks by itself to extinguish plaintiff's claim.

The verdict as rendered, was upon the issue of former recovery being a bar, whereas the real issue as shown by the pleadings and testimony, was whether plaintiff had title and right of possession.

In this case the jury did not find in accordance with the issues made by the pleadings, and did not find the title for or against plaintiff. The rule of law is precise upon this point.

> "A verdict is bad if it varies from the issue in a substantial manner." Magruder vs. Belt, 7 D. C., 311.

The matter presented in the motion should have been pleaded *puis darrein* continuance, and plaintiff afforded an opportunity to reply (which was his absolute right), which the court could not excuse or waive, and the proper place for such plea was before the trial. The defendant, had he pleaded specially, must have stated that the former recovery in 48,112 was for a part only of an entire and indivisible demand. The replication would have been that the claim now set up had not been submitted to the former jury, and was not so identified with the former action as to render it an entire demand incapable of subdivision. This would have formed an issue and the

inquiry would be whether the former recovery included or embraced the demand now in contest, an entirely different matter than plaintiff's title and right of possession to the property under general issue plea. It was a question of fact for the jury, but it was not offered in evidence or submitted to them, nor did they pass upon any fact connected with the case, but without leaving the box, found as directed by the court.

This is the difficulty. This "former recovery" was never pleaded, never offered in evidence, never got before the jury, and hence it is outside of any known rule, and the books nowhere refer to a case where a matter of this kind has been the subject of a motion.

Warville on Ejectment, 207, says:

> "Even where a defendant is not required to set up a title in himself, this fact being considered as involved in his denial of plaintiff's right, yet if he desires to avail himself of facts not amounting to such denial, it has been held that he must specifically plead them."

In Crandall vs. Gallup, 12 Conn., where the question was raised whether a plea tending to estop plaintiff from prosecuting an action of ejectment, was embraced in or amounted only to the general issue, it was held that such plea neither admitted nor denied the plaintiff's allegations, but advanced new matter and is a proper plea in an action of ejectment, the syllabus being:

> "The objection that a special plea amounts to the general issue is not available."

In Jackson vs. McConnel II, Johns N. Y., 423 (ejectment case), the court said:

> "The defendant should have disclosed his new defence (that plaintiff was an alien enemy) by a plea *puis darrein* continuance, and could not take the objection under the general issue."

> "New matter must be specifically pleaded, in

> spite of the comprehensiveness of the general issue. New matter such as a title acquired subsequent to issue joined must be set up by a supplemental answer in the nature of a plea *puis darrein* continuance." Citing 1 Wall., 274, Ency. Pl. and Pr., Vol. 7, 344.

In Jackson vs. Rich, 7 Johns N. Y., 194 (ejectment case), the court said:

> "The matter (agreement between the parties set up as a bar) arising since issue was joined, was properly rejected. Many terms of this court had intervened since it arose, and the rule is well settled, that matter arising after issue joined, and good by way of plea *puis darrein* continuance, must be pleaded without delay. The very name and form of the plea show that it must be pleaded as arising since the last continuance."

Chitty on Pleadings, 16 Ed., 535, says:

> "In all actions of trespass, whether to the person, personal or real property * * * matters in discharge must be specially pleaded as accord and satisfaction, *former recovery* * * *. These are positive rules of law in order to prevent surprise on the plaintiff at the trial by the defendant * * * of which he had no notice and which consequently he could not be prepared to meet at the trial on the plea of not guilty, on fair and equal terms with respect to the evidence and proof of facts."

Bigelow on Estoppel, says, pp. 13-14:

> "Numerous decisions in this country and England hold that where a party has an opportunity to plead an estoppel and voluntarily omits to do so, but goes to issue on the facts, he thereby waives the estoppel and the jury is at liberty to find according to the facts of the case. So where

> advantage might have been taken of an estoppel by means of demurrer, and the party failed so to take advantage of it, he will be held to have waived the estoppel."

Also:

> "The most usual manner in which it has been held that an estoppel is waived, is by omitting to plead it."

If defendant saw fit to go to three trials upon the merits, in the face of this former recovery, and not plead it, he should stand upon the merits now.

Defendant cannot be entitled to the benefit of an estoppel if he did not plead it, nor is he entitled to the benefit of the defence of a former recovery if he did not plead it.

PRESENT SUIT NOT FOR SAME CAUSE OR PART OF AN ENTIRE DEMAND.

Plaintiff contends that where in the former suit the title of a party to a specific interest has been directly alleged, and separated from all other matter, and an issue taken upon it, which involves no other matter, a recovery upon it does not estop a party in another suit from recovering upon another and different interest.

There were two distinct branches of this title from the time it left the common source, although sued at first in one action, one branch vesting in plaintiff directly from two of the four heirs of the common source, and finally embodied in suit 48,112, already tried, the other branch vesting in plaintiff 13 years later from three trustees in equity cause, after it had reached them through varied transfers and litigation, finally embodied in the present suit 49,305, now on trial. Defendant has not connected himself with either branch. "Not guilty" was pleaded to each of these actions, and the present suit has been twice tried in the lower court and once on appeal, upon this plea.

These interests required to be separately litigated and proved by separate and independent evidence.

The issue in 48,112 was plaintiff's title to the interest derived from Thomas D. Walker and Mary E. Walker, nothing else.

The issue in 49,305 is plaintiff's title to the interest derived from William R. Walker and Almea V. Davis, nothing else.

Not a single conveyance affecting plaintiff's title in one suit was used in the other.

No testimony in either suit was given in support of the other, save as to who were the living heirs of the common source.

At the last trial it was agreed of record, between counsel, that these interests are not the same but different and derived from different sources (R. 15).

Interest is defined to be right in property, share, portion, part.

It must follow that the matter for which the actions were brought was not the same but different; that the right in the property claimed in 48,112 was different from the right in the property now claimed in 49,305.

In the agreement, defendant characterizes the recovery in 48,112 as an interest, and the subject matter of the present suit as an interest, thereby conceding the causes of action in both suits *as interests,* and says they are different. It follows that if these interests are thus different in their nature, and from widely separated sources, a recovery as to one interest does not conclude plaintiff from further litigation of the title to the other interest.

The divisibility of a claim in an ejectment suit is recognized in Section 1000 of the D. C. Code, which provides that the part or interest sued for, may be divided between the plaintiff and the defendant according to the proof, and so separate were these interests regarded at the trial of 48,112 in the lower court, that defendant himself contended for the other part or interest not proved, claiming that it belonged to him by reason of the insufficient proof on part of plaintiff under Section 1000 of the D. C. Code, but the court refused to award it to him, which refusal formed one of his assigned errors on appeal to this court. (Brief in Case No. 1828, p. 2.) It was then treated as

a divisible action capable of being sued for separately and for 2½ years afterwards defendant treated these two suits as separate and independent actions.

Moreover, the divisibility of the action should be sustained from the necessity of the case, in that plaintiff was prejudiced in contemplation of law by the erroneous exclusion of the evidence at the trial of 48,112 (deed from the trustees in equity cause), under which he was entitled to recover, and prevented from exhibiting fully his case, a situation within the admitted exceptions to bringing a new action even for the same cause stated in 98 U. S., 95.

If these actions ever drifted towards forming a single and entire demand, the defendant has made them separate by his own agreement of record.

At the very time when the court was asked to instruct the jury to find for defendant, because there had been a recovery of an interest in 48,112, defendant admitted that this interest so recovered was another and different interest from that embraced in the present suit.

This admission means that the subject matter of the original suit embraced two different interests, on one of which there has been a recovery; and that the other interest now in suit is wholly different, derived from a different source, is separate and embraces a different matter. This admission is entitled to a fair common-sense interpretation, and means that the interest now in suit is a separate and independent interest, otherwise the admission was meaningless and deceptive.

It should be remembered that plaintiff is not suing or seeking to recover any title or interest from the defendant. No title, right or demand whatever is admitted in him. Plaintiff is simply seeking to eject defendant from a certain interest in land which he is wrongfully withholding, by showing not a better title, but the only legal title; and it is a wrong conception of the situation to hold that defendant can shield himself under the pretence that *he* is invested with a single and indivisible one and inseparable title, to recover which two separate actions can not be brought by the rightful owner.

When that motion was made, plaintiff had already established his title to the interest claimed by indisputable

proof, under the only plea filed and existing at the time, and was entitled to a verdict under Section 1000 of the D. C. Code. Defendant had offered nothing in his own behalf, but finding himself defeated, resorted to this new defense by snap motion. The evidence at the last trial established that defendant had nothing—nothing to split and nothing to lose but a picked-up defective tax title. Defendant, without title, is not in a position to dictate how many ejectment suits shall be brought against him. It cannot be an infringement of any privilege if he is pursued by a dozen suits, if he is a trespasser without right.

This cause of action is outside the realm of commercial transactions or contract matters between parties, where the relation of debtor and creditor exists, and where money measures the damages, and wherein the doctrine against splitting up a cause of action is held to apply. Defendant is a trespasser upon plaintiff's land; he is without title; he offered no testimony in his behalf at the last trial; he has been ejected from one part or interest, and this suit is to eject him from the other part or interest, which is a different part or interest from that from which he has been ejected.

ISAAC S. LYON.